Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

No. 93-1704

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STEVEN J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, *et al.*,
Petitioners,

v.

PWG PARTNERSHIP, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

BRIEF OF RESPONDENTS IN OPPOSITION

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Dated: May 18, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

PARTIES TO THE PROCEEDING

PWG Partnership ("PWG"), El Paso Production Company, and Meridian Oil Inc. (collectively "Respondents") submit this Brief in Opposition to the Petition for Writ of Certiorari on behalf of Respondents. Prior to its dissolution, PWG Partnership was a New Mexico partnership and did not have any publicly traded stock. El Paso Production Company and Meridian Oil Inc. are subsidiaries of Burlington Resources Inc.

A. PWG Group.

Graham Royalty Ltd., Prudential Bache Energy Production Inc., Prudential Bache Energy Income Production Partnership IIP-10, Prudential Bache Energy Income Production Partnership IIP-11, Prudential Bache Energy Income Production Partnership IIIP-12, Prudential Bache Energy Income Production Partnership IIIP-13, Prudential Bache Energy Income Production Partnership IIIP-14, Prudential Bache Energy Income Production Partnership IIIP-15, Prudential Bache Energy Income Limited Partnership IVP-16, and Prudential Bache Energy Income Limited Partnership IVP-17 (collectively "Pru-Bache Entities"), and PWG Partnership (collectively "PWG Group"), composed a group of defendants with common ownership interests in the GLA-59 properties. In November 1993, after judgment in the trial court, the Pru-Bache Entities transferred their interests in the oil and gas properties at issue and, therefore, have no interest in the outcome of the Petition. Meridian Oil Production, Inc. acquired the interests formerly owned by the Pru-Bache Entities in February 1994.

B. El Paso Group.

Petitioners' List of Parties incorrectly describes the corporate ownership of, and relationships between, El Paso Production Company, El Paso Natural Gas Company, and Meridian Oil Inc. El Paso Natural Gas Com-

pany was spun off by Burlington Resources Inc. on June 30, 1992. El Paso Natural Gas Company has been a publicly held corporation traded on the New York Stock Exchange since March 12, 1994. El Paso Production Company and Meridian Oil Inc. are wholly-owned subsidiaries of Meridian Oil Holding Inc. Since the sale of El Paso Natural Gas Company, there has been no corporate affiliation between El Paso Natural Gas Company and any of the Respondents. El Paso Production Company and Meridian Oil Inc. have assumed all of the rights and obligations of El Paso Natural Gas Company with respect to the property and the litigation. Meridian Oil Inc. managed the oil and gas leases at issue as agent for the lessee/owner, El Paso Production Company.

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This case is a paradigm for the denial of certiorari. The controversy involves no conflict between decisions of the New Mexico Supreme Court and other United States courts of appeals or state courts of last resort as to federal or nonfederal mattters; involves no constitutional issues; and involves no important issues already pending before the Court. Indeed, there are no special or important reasons to grant certiorari. Respondents, therefore, request that this Court deny the Petition for Writ of Certiorari seeking review of the New Mexico Supreme Court's opinion in this case. That opinion, issued on De-

cember 3, 1993, is reported at 866 P.2d 311 (N.M. 1993).[1]

STATEMENT OF THE CASE

Respondents adopt the statement of the facts contained in the New Mexico Supreme Court's opinion.[2] In sum, this case involved competing claims to ownership of the lessee's interests in federal oil and gas leases under a September 9, 1952 Oil and Gas Lease Sale Agreement known as "GLA-59." The signatory parties to GLA-59 were El Paso Natural Gas Company and Mike and Roseline Abraham (husband and wife, sometimes referred to herein as Seller), both of whom are now deceased. Under GLA-59, the Seller agreed to sell federal oil and gas leases to El Paso Natural Gas Company, while reserving interest in the oil and liquid hydrocarbons under the leases. The Seller also reserved the right to repurchase the leases after El Paso Natural Gas Company had produced a certain amount of gas from the properties.

The case was divided into three phases: (1) adjudication of the enforceability of GLA-59 by Roseline Abraham or the PWG Group as successor-in-interest against claims that the rule against perpetuities, merger, and other common law doctrines applied; (2) an ownership trial to determine whether the PWG Group or Roseline Abraham was the owner of the rights of the Seller under GLA-59, including the option to repurchase; and (3) a trial on accounting issues to determine whether the option to repurchase had matured.[3] In the second phase, the

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[1] Citations to the Petition for Writ of Certiorari are identified as "Petition" followed by a reference to a page number, as appropriate. Citations to the transcript of record are identified as "T.R." followed by a reference to a page number, as appropriate. Relevant sections of the transcript of record are reproduced in the Appendix attached hereto.

[2] *See* Petition Appendix at A 2-10.

[3] Petitioners include at least one misstatement in their Statement of the Case. *See* Petition at 9. Petitioners assert that the date of

trial court heard testimony from dozens of witnesses and reviewed hundreds of exhibits. The evidence at trial retraced the nearly fifty-year history of the GLA-59 leases from the date of their issuance by the United States in the late 1940's and early 1950's up through the period shortly before suit in which PWG and Roseline Abraham (and the Estate of Mike Abraham) made their competing claims to ownership of the rights of the Seller under GLA-59.

The trial court quieted title in the PWG Group to the interests in the GLA-59 leases and held that: (1) PWG owned the option to repurchase the Seller's interest under GLA-59; and (2) Petitioners had no rights, title, interest, or claim to or upon the Seller's interest under GLA-59. The New Mexico Supreme Court affirmed the trial court's decision holding that under New Mexico law, the Abrahams were presumed to have granted their rights, title, interest, and claims in the interests of the GLA-59 leases.[4]

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maturation of the repurchase option is January 15, 1989. The only source for the maturation date is the stipulation between El Paso and PWG, which applies only to those parties. At a minimum, Petitioners' statement with respect to maturation of the option is a red herring. Under Petitioners' theory of the case—that the option was a personal contract incapable of assignment, *see* Petition Appendix at A 18-19, the option expired upon the death of Mike Abraham or Roseline Abraham. *See In re Estate of Maguire*, 204 Kan. 686, 466 P.2d 358 (1970).

[4] The New Mexico Supreme Court also reversed and remanded the trial court's decision reducing the amount of the civil contempt award against Thomas R. Hartnett, III, for violating the court's injunction against Hartnett's further prosecution of a vexatious suit in Texas over the same subject matter. Neither Petitioners nor their attorney seek review of the contempt aspect of the New Mexico Supreme Court's decision. *See* Petition Appendix at A 35-48.

REASONS FOR DENYING THE WRIT

Petitioners have offered no convincing reason why this Court should become involved in a state-law property dispute. Having failed to carry the day in the New Mexico state courts, Petitioners have concocted a series of federal questions, none of which was properly preserved below and none of which is substantial. The petition should be denied.

I. PETITIONERS FAILED TO RAISE THEIR FEDERAL CLAIMS BELOW

Petitioners did not adequately present their federal claims in the New Mexico courts. To the extent that Petitioners raised these issues below they were presented too late to preserve the issues for review by this Court. To begin with, Petitioners' Question For Review I was never presented in any form in the courts below. If Petitioners had presented their federal claim below, the New Mexico courts would have been able to clarify the judgment or otherwise reemphasize what everyone already understands—*i.e.*, that the judgment was intended only to establish the rights of the private parties before the court in the GLA-59 leases, and has no effect on the rights of the United States.

Petitioners concede that they suggested Question For Review II for the first time in the motion for rehearing in the New Mexico Supreme Court.[5] Under New Mexico practice, parties may not raise new issues at the rehearing stage.[6] Consistent with this practice, the New Mexico Supreme Court did not address any federal statutory ques-

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[5] *See* Petition at 12 (quoting motion for rehearing) (" 'This issue is raised for the first time on this motion for reconsideration.' ").

[6] *State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (Ct. App.) ("It has been an unwavering rule in this jurisdiction for almost 70 years that new points may not be presented in a petition for rehearing."), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).

tion—instead merely denying rehearing summarily.[7] On such facts, this Court repeatedly has held that federal questions first presented to the highest state court on a petition for rehearing come too late for consideration by this Court, absent circumstances not present in this case.[8]

Recognizing the problem with their tardy injection of a new issue into the case, Petitioners in the court below argued that the purported conflicts with "paramount federal law" deprived the New Mexico state courts of *jurisdiction*. But this is absurd on its face. Petitioners never argued that the New Mexico courts were barred from determining who has title to the option. Nor could they have done so, since it is well established that state law governs transfers of federal mineral leases among private parties,[9] and that, while the Secretary of the Interior must approve transfers of interest in leases, any private dispute over the validity or effect of such a transfer must first be resolved in court.[10]

What Petitioners argued on rehearing below, and again here, is that the doctrine of presumed grant is not a proper basis on which to adjudicate interests in federal mineral leases.[11] Whether valid or not, that argument, on

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[7] *See* Petition Appendix at B 1-4. New Mexico's Rules of Appellate Procedure preclude a party from responding to a motion for rehearing unless the motion is granted. *See* N.M. Sup. Ct. R. Ann. 1986, 12-404. The New Mexico Supreme Court denied Petitioners' motion for rehearing without a response from the prevailing appellees.

[8] *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975).

[9] *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-71 (1966).

[10] *Id.* at 70 n.8.

[11] *See* Petition at i, 12, 16.

its face, has nothing to do with the *jurisdiction* of the courts below to decide this property dispute. At most, what Petitioners are saying is that federal law preempts one particular aspect of state property law. That is an argument they were obligated to raise and properly preserve in the courts below.

Petitioners nowhere presented in the courts below the bulk of their due process claims as presented in Question For Review III. The only due process issue presented in the appeal to the New Mexico Supreme Court, or in the rehearing motion, had to do with reliance on the conduct of Mike Abraham as evidence supporting the conclusion that his wife, Roseline Abraham, had transferred her rights to the option. Petitioners now seek to inflate this contention by adding in a range of state-law claims that they never stated in constitutional terms until they filed the petition in this Court. Petitioners' attempt to manufacture a federal case to support review by certiorari after the New Mexico Supreme Court rendered its opinion is too late and too little to warrant this Court's exercise of jurisdiction over the matter.

II. EVEN IF PETITIONERS' CLAIMS WERE PROPERLY BEFORE THE COURT, THEY WOULD NOT MERIT REVIEW

It is axiomatic that the Supreme Court does not review a case from a state's highest court unless the case raises important federal issues. As one could expect in a very complex and probably unique state-law property case, Petitioners have not met that standard here. To the extent that they have identified any federal issues at all, they have failed utterly to show that these are issues warranting the attention of this Court.

Petitioners' first argument—that the judgment below was improperly phrased so as to deprive the United States of its interest in oil still in the ground—is erroneous and obviously fact-specific. The significance of the issue is further diminished by the fact that the United States, as a

non-party, would not be bound by the judgment in any event.

As for the second argument—that the decision below contravenes the authority of the Secretary of the Interior to approve or disapprove transfers of interests in federal mineral leases—Petitioners have cited no conflict with the decisions of any other court. The reason, as we have already suggested, is that it is universally recognized that courts should first adjudicate ownership disputes among private parties over rights in federal mineral leases, leaving it to the Secretary thereafter to approve any transfers necessary to effectuate the judgment.[12]

It is difficult to imagine a more fact-specific argument than Petitioners' due process claim, which amounts to the suggestion that a series of state-law errors by the New Mexico Supreme Court, taken together, constituted a deprivation of due process. Even if this Court were to rule in Petitioners' favor on that contention, its decision would have no application to any other subsequent case because the facts presented here will almost certainly never be replicated.

III. THE NEW MEXICO SUPREME COURT'S DECISION ON THE MERITS WAS CORRECT

A. The Trial Court's Judgment Did Not Affect The United States' Ownership Interest In The Land Or Minerals.

Petitioners assert that the New Mexico Supreme Court's decision applying state law divested the United States of its title to and rights in the minerals under the leasehold estate. Petitioners misconstrue and distort the effect of the New Mexico Supreme Court's holding that the PWG Group owned the lessee's interests in the subject leases. The New Mexico courts merely adjudicated the rights of the private parties before them. It is beyond dispute that

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[12] *Wallis*, 384 U.S. at 68-71.

conflicts of this nature are resolved under state law.[13] Thus, contrary to Petitioners' assertions that the New Mexico Supreme Court contravened federal law, the New Mexico Supreme Court did nothing to "divest the United States of its title to the minerals."[14] In an attempt to create the illusion of a federal issue, Petitioners obscure the determinative difference between the United States' *fee interest* in federal land and *lessee interests* obtained from the United States to develop the minerals under the fee estate. There is nothing unusual about a state court adjudicating private parties' competing claims to interests in federal oil and gas leases.

The United States, which was not a party to the case below, certainly would be surprised to learn of Petitioners' contention that the trial court's judgment "divests the title of the United States to the underlying deposits of oil in federal lands."[15] The objective intent and only conceivable effect of the New Mexico Supreme Court's judgment was to quiet title to the leasehold interests and repurchase option of the PWG Group *vis-a-vis* Petitioners.

The judgment recites in pertinent part that the PWG Group:

> have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title to *all Seller's interests in GLA-59*, including but not limited to the option to repurchase mentioned in Article VII, Sec. 2 therein, applicable to the leases hereinafter in this decretal clause recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF 079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 0792002, NM 012735, and SF 079012.[16]

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[13] *Wallis*, 384 U.S. at 68-71.

[14] *See* Petition at 13.

[15] *See* Petition at 13.

[16] *See* Petition Appendix at D 3-4 (emphasis added).

The judgment is limited by its own terms to the lessee estate, *i.e.*, "Seller's interests in GLA-59." The trial court did not quiet the title of PWG against the United States or the world or otherwise affect the federal fee interest; it only provided that:

> The foregoing title of (the PWG Group) *in and to all Seller's interests in GLA-59*, enumerated in Decretal Clause No. 1 above, be, and the same hereby is, forever quieted and set at rest against the claims, demands and pretensions of defendant Roseline Abraham, [and the other parties to the litigation]; and of all persons claiming or to claim from or through them, or any of them.[17]

The United States' fee or reversionary interest in the leases simply was not affected by the judgment.

In sum, the New Mexico courts did nothing to deprive the United States of its property rights in or title to the fee interest in the leased land. Under the New Mexico Supreme Court's decision, the United States retained all of its fee interest, while based on the facts of the case and the proper application of state law, the New Mexico courts determined that PWG owned the lessee interests in the GLA-59 leases over the claims of Petitioners.

B. Private Ownership Disputes Concerning Interests In Federal Oil And Gas Leases Are Resolved Under State Law And Raise No Federal Question.

Federal law does not preempt state law as the rule of decision for determining competing claims to ownership of lessee interests under federal leases. In *Wallis v. Pan American Petroleum Corp.*,[18] this Court rejected a contention that federal common law must be applied over state law to determine competing claims to ownership of interests in federal oil and gas leases. The Court concluded:

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[17] *Id.* at D 6-7 (emphasis added).

[18] 384 U.S. at 68-69.

> We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here.
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> * * * *
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> The Secretary [of the Interior], who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be.[19]

Wallis, like the case at bar, involved a dispute by which a party claimed ownership of a federal lease under an option agreement. Significantly, the Court noted that where there is a private dispute as to the validity or effect of an assignment, the Secretary of the Interior does not decide the question but will simply take no action until the parties settle their dispute in court.[20] That is all that has happened here: a state court resolved a private dispute regarding ownership of interests in federal oil and gas leases by the proper application of state law. As the Court held in *Wallis*, no federal interest is contravened by the application of state law to determine the ownership interests in federal oil and gas leases.[21]

Under the Mineral Leasing Act of 1920 (the "Act"), 41 Stat. 437, 30 U.S.C. § 181 *et seq.*, the United States expressly reserves its ownership of and rights in federal land leased for oil and gas exploration.[22] Private parties may obtain a lease from the federal government to extract

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[19] *Id.* at 69-70.

[20] *Id.* at 70 n.8.

[21] *Id.* at 70-71. *See also O'Kane v. Walker*, 561 F.2d 207, 211 (10th Cir. 1977) (New Mexico rather than federal law controls in disputes over ownership of federal oil and gas lease).

[22] *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963) ("Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continued supervision by the Secretary [of the Interior].").

the minerals under the fee estate. These parties also may alienate their lessee interests freely without prior federal approval as long as they comply with the requirements of the Act and the implementing regulations.[23]

The federal scheme fully accommodates the transfer of lessee interests such as those at issue here. The only requirement to transfer the lessee interests in a federal oil and gas lease is that the parties must complete an approved form.[24] The only other conditions of transfer are terms and conditions specified in the federal lease. Thus, the transfer of lessee interests in the GLA-59 leases by Mike and Roseline Abraham and their successors-in-interest did not require prior federal approval and did not otherwise raise any federal issues. Such transfers affect only the lessee interests; they have no effect on the federal government's fee interest. After approval of the transfer, the transferee is responsible for the performance of all lease obligations, but the approval of the transfer takes effect the first day of the month in which the form is filed.[25]

To recognize Petitioners' federal claim would require the Court to overrule *Wallis* and hold that the United States is an indispensable party in every case involving disputes between private parties over interests in federal oil and gas leases.[26] To the contrary, the Department of the Interior has indicated time and time again that "it will not take sides in private disputes" and that matters pertaining to such disputes fall outside of the proper role of

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[23] *See* 43 C.F.R. § 3106.1 ("Leases may be transferred by assignment or sublease as to all or part of the acreage in the lease or as to either a divided or undivided interest therein.").

[24] *See* 43 C.F.R. § 3106.4-1 ("Each transfer of record title or of an operating right (sublease) shall be filed with the proper BLM office on current form approved by the Director . . . .").

[25] *See* 43 C.F.R. §§ 3106.7-2, 3106.7-4.

[26] In the New Mexico courts, Petitioners argued for application of Texas law and against application of the Act on the ownership issues. *See* Petition Appendix at A 18-34.

the Interior Department in administering the lease.[27] Given the Department of the Interior's long-standing policy of disclaiming any interest in private ownership disputes, the United States is not a necessary party and there is no federal question implicated by such disputes.[28]

When an ownership dispute arises and is eventually resolved in the courts, the Department of the Interior, applying the statutory criteria, is free to disapprove any resulting assignment.[29] Thus, the federal interest is fully protected in the event of ownership disputes under state law.

In *Wallis*, this Court determined that there is no conflict with state law and no significant threat to any identifiable federal policy or interest to justify the creation of federal common law to determine competing claims to ownership of interests in federal oil and gas leases. The statutory recognition of various rights and obligations in the lessee of record referred to by Petitioners[30] simply reinforces the leasehold covenants and ensures that the United States has a party to whom it can look to enforce

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[27] *See Spectrum Oil & Gas Co.*, 73 I.B.L.A. 162, 163, GFS (O&G) 183 (1983); *William B. Brice*, 53 I.B.L.A. 174, 177, GFS (O&G) 63 (1981) ("[T]he proper forum to resolve controversies regarding oil and gas lease assignments is a court of competent jurisdiction."); *see also Tom Bolack, GFS* (O&G) 50-1063-30 (1963) (Interior Department policy gives recognition to judicial determination as to the rights of parties under federal leases).

[28] *See Chuska Energy Co. v. Mobil Exploration & Producing Inc.*, 854 F.2d 727, 730 (5th Cir. 1988) (defendant cannot remove suit for breach of an assignment of operating agreement covering leases on Indian land). If Respondents or Petitioners had attempted to initiate an administrative proceeding with the Department of the Interior, they would have been directed to resolve their disputes or initiate litigation, with the Department abiding by the results of the litigation. *See O'Kane*, 561 F.2d at 210 (describing order of Interior Board of Land Appeals in the case).

[29] *See Wallis*, 384 U.S. at 70. *See also* 30 U.S.C. § 184.

[30] *See* Petition at 21-26.

those covenants and federal statutory obligations.[31] Petitioners' federal claim, therefore, does not merit the Court's attention.[32]

C. Petitioners' Due Process Claims Are Not Supported By The Record.

The gravamen of Petitioners' due process claims is that the New Mexico courts deprived Roseline Abraham of her constitutional rights because the trial court based its decision on the doctrine of presumed grant in violation of New Mexico pleading requirements and without giving Petitioners notice that the trial court was applying the doctrine. Petitioners' assertions clearly are contrary to the evidence adduced below.

Doubtless Roseline Abraham and her husband Mike Abraham conveyed all of their interest in six of ten leases involved in this case.[33] Among its alternative grounds for

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[31] *See* 30 U.S.C. § 187(a).

[32] Petitioners also ambiguously contend that the judgment of the New Mexico Supreme Court ousts the Unit Operator in connection with the GLA-59 leases, or otherwise interferes with exclusive possession by the Unit Operator, and that this creates a federal issue. Petition at 18-22. Petitioners are wrong. The recognition of PWG's ownership interests over Petitioners' claims did not effect a change in the operator of the properties, as Petitioners seem to suggest. A unit operating agreement is commonly intended to permit operators or pipeline companies to enter into contracts with a number of lessees sufficient to justify operations on an efficient scale. *See* 43 C.F.R. § 3105.3-2. "Unit Operator" is "the person authorized under the agreement approved by the Department of the Interior to conduct operations within the unit." 43 C.F.R. § 3100.0-5(b).

[33] Of the ten GLA-59 federal oil and gas leases whose ownership was in question, six were conveyed to Rincon Oil & Gas Corporation by an instrument executed by both Mike Abraham and Roseline Abraham on June 3, 1963. Because the trial court and the New Mexico Supreme Court concluded that the option to repurchase was assignable (Petition Appendix at A 18-19), the option to repurchase passed by an express, recorded grant joined by Roseline Abraham as to six leases. Petitioners neglect wholly to mention that the conveyance of June 3, 1963 was made in furtherance of a

decision, the trial court held that the May 29, 1963 agreement was a specifically enforceable contract executed by Roseline Abraham and that PWG owned the leases omitted from the June 3, 1963 conveyance by application of the doctrine of equitable conversion.[34] The New Mexico Supreme Court, however, decided it need not rely on the doctrine of equitable conversion resulting from the May 29, 1963 agreement because the lower court correctly applied the doctrine of presumed grant.[35] Application of the doctrine of presumed grant was an alternative state law basis to equitable conversion for curing the omission of the four leases from the June 3, 1963 conveyance that should have performed the terms of the May 29, 1963 agreement.[36]

Next, Petitioners argue that they did not have notice that the New Mexico courts would consider applying the doctrine of presumed grant to vest title in the PWG Group.

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written agreement of May 29, 1963, in which Mike Abraham and Roseline Abraham and Mike Abraham's brother and wife agreed to transfer to Rincon all of their interest in all ten leases. Petition Appendix at A 5-8, A 12-16, A 17-18, and A 24-25.

[34] Petition Appendix at A 15-16. The trial court held in the alternative that Rincon as purchaser under the real estate contract was entitled to specific performance by way of a court-ordered grant. *Marks v. City of Tucumcari*, 93 N.M. 4, 5, 595 P.2d 1199, 1200-01 (1979); *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 416, 129 P.2d 974, 976 (1942). Had the trial court not presumed a grant it would have awarded an equitable remedy that would have yielded precisely the same result.

[35] Petition Appendix at A 15-17.

[36] The same Thomas R. Hartnett, III, representing Petitioners in this proceeding was the lawyer for Mike and Roseline Abraham in the financial reorganization of their business, which entailed the May 29, 1963 agreement and the June 3, 1963 conveyance between them and their corporation, Rincon Oil & Gas Co. Petition Appendix at A 8-15. Now that same lawyer argues that he and his clients' estate should benefit from the omission of four leases from the June 3, 1963 conveyance.

Again, Petitioners' assertions are unavailing. Petitioners clearly had notice that presumed grant applied to this case. On ruling on the Abrahams' motion *in limine before* trial, the court alerted the Abrahams that PWG's ownership claim might rest on "presumption."[37] The parties proceeded to trial on that basis and only at the end of closing argument was an observation—not an objection—made by the Abrahams' counsel that the doctrine was not pleaded[38] and that PWG's trial brief on the doctrine of presumed grant was not supported by the pretrial order statement of claims. To this the trial court replied:

> The Court thinks it is. The Court discussed it at the motions hearing. There was a brief on presumption of grant, prior to the motions hearing, that the PWG defendants had submitted. The Court read it and commented on it at that point. There is a claim in the pleadings that the PWG defendants are the owners of the property, a general allegation, and that permits PWG to assert any theory justified under the facts. . . .[39]

The issue of presumed grant was effectively tried by Petitioners' consent.[40]

Moreover, Petitioners erroneously label the possession necessary for a presumed grant as "adverse." As the New

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[37] T.R. at 91, Opposition Appendix at 1a.

[38] T.R. at 2217, Opposition Appendix at 3a-4a.

[39] T.R. at 2222, Opposition Appendix at 4a-5a.

[40] *See Dale J. Bellamah Corp. v. City of Santa Fe*, 88 N.M. 288, 291, 540 P.2d 218, 221 (1975); *White v. Wayne A. Lowdermilk, Inc.*, 85 N.M. 100, 101, 509 P.2d 575, 576-77 (Ct. App. 1973). Petitioners cite dictum in *Clark v. Amoco Prod. Co.*, 794 F.2d 967 (5th Cir. 1986), and *Hunt v. McCain*, 73 S.W.2d 564 (Tex. Civ. App.—Waco 1934, *writ dism'd w.o.j.*), for the proposition that all elements of a presumed lost deed must be pleaded and proved. The New Mexico Supreme Court properly held that the dictum in *Clark v. Amoco Prod. Co.* was not controlling, and that the trial court properly raised and considered the possibility of applying the presumption of grant. Petition Appendix at A 31-32.

Mexico Supreme Court analysis correctly observed, presumed grant instead "involves the rightfulness of one's possession . . . ." [41]

The New Mexico courts reviewed the evidence that showed Mike Abraham knew at the time of his 1964 bankruptcy that the option to repurchase could ripen as early as 1964; that Mike Abraham and his attorney, Thomas Hartnett, III, accepted and acted for some twenty-six years upon the belief that all rights had been transferred to Rincon; that beginning in 1976, El Paso Natural Gas Co. began treating PWG as the owner under the GLA-59 leases and the Abrahams stood by without objection.[42] In contrast, *Love v. Eastham*,[43] the sole authority cited by Petitioners, involved an owner, Love, who moved away from the subject property and never knew of the possession and claim made by Eastham. *Love* presents a clearly different situation than here.

Petitioners cannot obfuscate the fact that Roseline Abraham had full notice of the basis of the New Mexico courts' decisions. Petitioners not only knew that the New Mexico courts thought that the doctrine of presumed grant applied to this case, by virtue of the court's ruling on the motion *in limine* (*see supra* note 37), Petitioners also argued for equitable relief from application of the doctrine, which the New Mexico courts rejected.[44] Following a full consideration of the merits, the New Mexico Supreme Court determined that ample evidence in the record existed to find that the Abrahams conveyed or as a matter of law were presumed to have conveyed *all* of their interest in the GLA-59 leases.[45]

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[41] Petition Appendix at A 32-33.

[42] Petition Appendix at A 8-13.

[43] 137 Tex. 462, 154 S.W.2d 623 (1941).

[44] Petition Appendix at A 25.

[45] Petition Appendix at A 8-10, A 34.

Finally, Petitioners make two desperate attempts to fabricate federal issues upon which they entreat the Court to grant their petition. Petitioners contend that an oil and gas leasehold is not real property and cite in support *Boesche v. Udall*, 373 U.S. 472 (1963).[46] This is a baffling misinterpretation or misrepresentation. The case says nothing of the sort.

The federal oil and gas leases that would be transferred from El Paso to the Seller upon exercise of the option in GLA-59 are real property.[47] "Since 1922, [the New Mexico Supreme Court] has consistently held that oil and gas and mineral leases are real property."[48] The federal courts have reached the same conclusion with respect to federal leases.[49]

Next, Petitioners claim both that the leases were personal property and invoke the New Mexico joinder statute, which requires that a spouse be divested of *real property* only by a written conveyance signed by her.[50] In fact, Roseline Abraham joined in the written agreement of May 29, 1963, by which she and her husband promised in writing to make the transfer to Universal Minerals (which became Rincon) and in return received $1.5 million from Chemical Bank.[51] As the trial court found, she subsequently benefitted by the discharge of this loan in bankruptcy proceedings and in the sale of Rincon stock to Chemical Bank, which sale was premised, in part, upon Mike Abraham's and attorney Hartnett's representations

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[46] Petition at 27.

[47] *Padilla v. Roller*, 94 N.M. 234, 608 P.2d 1116 (1980).

[48] *Id.*

[49] *O'Kane*, 561 F.2d at 211; *see also Pacific Enterprise Oil Co. v. Hertz*, 893 P.2d 280, 284 (10th Cir. 1990).

[50] Petition at 28 (citing N.M. Stat. Ann. § 40-3-13A. (Michie 1978)).

[51] Petition Appendix at A 4-5.

that Rincon owned all of the Seller's interests in GLA-59. On the basis of both "logic and policy" the New Mexico courts applied a rule of property law, presumed grant, against both spouses because it followed from the evidence and served to protect those who have held long possession of property with the acquiescence of the record owners.[52]

Petitioners also mix in the notion that Rincon was purportedly "satisfied" by the Abrahams' performance of the May 29, 1963 agreement, suggesting that such satisfaction somehow would preclude successor claims under the agreement. Petitioners cite one authority, *Williams v. Eggleston*,[53] in support of this proposition.[54] The issue in *Williams* was whether a third party would be allowed to interject itself into a contract dispute.[55] The Supreme Court noted that, unless the third party had an interest in the contract, it would not be allowed to become part of the litigation.[56] Petitioners quote from *Williams* out of context to support an argument that completely ignores that PWG had an interest in those transactions.

Petitioners attempt to use the "satisfaction" theory from a passage lifted from *Williams* to tout the allegedly "uncontradicted testimony" of W. H. Hudson "that he, and Rincon, were satisfied with the performance of the Agreement to Convey by the Abrahams."[57] Actually, Mr. Hudson's testimony was very equivocal. When directly asked whether the GLA-59 option was to be part of the Rincon conveyance in the 1963 transaction, Mr. Hudson

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[52] Petition Appendix at A 25-26.

[53] 170 U.S. 304 (1898).

[54] Petition at 30-31.

[55] 170 U.S. at 309.

[56] *Id.* ("The town is, therefore, an entire stranger to the contract . . . .").

[57] Petition at 30.

could not remember.[58] The witness was attempting to resurrect events twenty-five years past, while most of the compelling evidence in the trial court consisted of undisputed documents executed contemporaneously with the events in question.

This case turns solely upon an analysis of the particular facts involved. The Court should not grant certiorari to review the factual findings of the lower courts.[59] In the present case, the trial court found that Mike and Roseline Abraham had transferred all of their interest in the subject leaseholds. The New Mexico Supreme Court affirmed these findings of fact and the application of New Mexico law. This Court should not reexamine the New Mexico courts' findings of fact or conclusions of fact.[60]

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[58] T.R. at 1400-01, Opposition Appendix at 1a-3a.

[59] *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *See also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

[60] *See Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

CONCLUSION

This is not the case as described in Petitioners' opening paragraph of their Statement of the Case. In this case, the New Mexico courts correctly applied state law to resolve a dispute over the ownership of lessee interests in federal oil and gas leases without affecting any fee interest of the United States. This case presents no federal issue for this Court's consideration. The Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: May 18, 1994